A

DATARAN RENTAS SDN BHD

v.

BMC CONSTRUCTION SDN BHD

B

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
NIK HASHIM FCJ
HASHIM YUSOFF FCJ
[CIVIL APPEAL NO: 02-9-2007 (P)]
29 JANUARY 2009

C

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Propriety of questions framed - Whether questions related to matter determined by High Court and Court of Appeal - Whether issue raised in Court of Appeal - Whether answers to questions had effect of reversing judgment of Court of Appeal - Courts of Judicature Act 1964, s. 96*

D

In this appeal before the Federal Court, the facts were that the appellant had a building contract with the respondent which the appellant awarded to pursuant to a letter of award. The terms and
E conditions of the contract were as per the PAM Standard Form Contract 1969 Edition (Without Quantities) ('PAM Conditions'). The appellant failed to pay four interim certificates amounting to RM173,096.18 within the time stated under cl. 30(1) of the PAM Conditions and the respondent filed a winding-up petition in the
F High Court against the appellant. The appellant was accordingly wound up and the appellant appealed to the Court of Appeal. The Court of Appeal dismissed the appeal and the appellant applied for leave to appeal to the Federal Court which was allowed. The following questions were framed for determination
G before the Federal Court: (i) whether the building contract entered into between the appellant as employer and the respondent as contractor in pursuance of the letter of award was illegal under the provisions of the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 ('LPIPM Act'); (ii) whether the
H respondent was entitled to present a winding-up petition on the basis of the architect certificates or enforce payment of the architect certificates issued in respect of the building contract entered into between the appellant as the employer and the respondent as the contractor in pursuance of the letter of award.

I

The issue before the Federal Court was the propriety of the questions posed pursuant to s. 96(a) of the Courts of Judicature Act 1964 ('CJA').

Held (dismissing the appeal)
Per Nik Hashim FCJ delivering the judgment of the court:

(1) To come within the ambit of s. 96(a) of the Act, the applicant must (1) satisfy the Federal Court that the judgment of the Court of Appeal is in respect of any civil matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage and (2) frame the question in such a manner as to incorporate a point of law the answer to which has the effect of reversing the judgment of the Court of Appeal. The questions posed must also relate to a matter in respect of which a determination has been made by the High Court and the Court of Appeal. However, a new point of law can be raised if all the facts necessary to support it have been raised in the Court of Appeal. (paras 6 & 7)

(2) The Federal Court was asked to answer an issue which was not determined by the High Court as well as the Court of Appeal. The issue was on the legality of the contract. It was best that the issue of the legality be considered and decided by the High Court and the Court of Appeal in determining whether the contract was illegal under the provisions of the LPIPM Act. The issue of legality of contract was abandoned in the High Court at submission stage and in fact not even stated in the appellant's memorandum of appeal at the Court of Appeal. The abandonment of the issue was clearly evidenced in both the High Court and the Court of Appeal judgments. Therefore, the Federal Court could not reopen and reconsider the issue. (para 9)

(3) The questions posed were not properly framed under s. 96(a) of the Act. Further, they did not relate to a matter in respect of which a determination was made by the High Court and the Court of Appeal. Neither was there any evidence that the issue of legality of the contract was ever raised in the Court of Appeal. It would be a waste of judicial time and not a proper exercise of authority of the Federal Court to engage itself in deciding such questions the answers to which would not have the effect of reversing the judgment of the Court of Appeal. (para 10)

Bahasa Malaysia *Translation Of Headnotes*

Dalam rayuan di hadapan Mahkamah Persekutuan di sini, faktanya adalah bahawa perayu mempunyai satu kontrak bangunan dengan responden yang perayu awardkan kepada responden melalui satu surat tawaran. Terma dan syarat kontrak adalah sepertimana PAM Standard Form Contract 1969 Edition (Without Quantities) ('Syarat-Syarat PAM'). Perayu gagal membayar atas empat sijil interim berjumlah RM173,096.18 dalam tempoh yang ditetapkan oleh fasal 30(1) Syarat-Syarat PAM dan responden telah memfail petisyen penggulungan terhadap perayu di Mahkamah Tinggi. Berikutnya perayu telah digulungkan dan perayu merayu ke Mahkamah Rayuan. Mahkamah Rayuan telah menolak rayuan dan perayu memohon dan memperoleh kebenaran untuk merayu ke Mahkamah Persekutuan. Soalan-soalan berikut telah dikemukakan untuk keputusan Mahkamah Persekutuan: (i) Sama ada kontrak bangunan yang dimeterai di antara perayu sebagai majikan dan responden sebagai kontraktor berdasarkan surat tawaran tidak sah di bawah peruntukan Akta Lembaga Pembangunan Industri Pembinaan Malaysia 1994 ('Akta LPIPM'); (ii) Sama ada responden berhak mengemukakan petisyen penggulungan berasaskan sijil-sijil arkitek ataupun menguatkuasakan pembayaran sijil-sijil arkitek yang dikeluarkan berkaitan kontrak bangunan yang dimasuki oleh perayu sebagai majikan dan responden sebagai kontraktor ekoran dari surat tawaran.

Di hadapan Mahkamah Persekutuan, isu yang berbangkit adalah mengenai kewajaran soalan-soalan yang dikemukakan di bawah s. 96(a) Akta Mahkamah Kehakiman 1964 ('AMK') tersebut.

Diputuskan (menolak rayuan)

Oleh Nik Hashim HMP menyampaikan penghakiman mahkamah:

(1) Untuk termasuk ke dalam rangkuman s. 96(a) AMK, pemohon hendaklah (1) memuaskan Mahkamah Persekutuan bahawa penghakiman Mahkamah Rayuan adalah berhubung satu perkara sivil yang diputuskan oleh Mahkamah Tinggi dalam pelaksanaan bidangkuasa asalnya mengenai persoalan prinsip am yang diputuskan buat pertama kali ataupun satu persoalan penting berkaitan mana hujah-hujah lanjut dan keputusan Mahkamah Persekutuan akan memanfaatkan orang awam; dan (2) merangkakan soalan dengan sebegitu cara bagi memasukkan persoalan undang-undang di mana jawapan kepadanya mempunyai kesan mengakas keputusan Mahkamah

Rayuan. Soalan-soalan yang dikemukakan hendaklah juga berkaitan dengan perkara di mana keputusan mengenainya telah dibuat oleh Mahkamah Tinggi dan juga Mahkamah Rayuan. Bagaimanapun, satu persoalan undang-undang yang baru boleh dibangkitkan jika semua fakta-fakta yang menyokongnya telah dibangkitkan di Mahkamah Rayuan.

(2) Mahkamah Persekutuan telah diminta untuk menjawab satu isu yang tidak diputuskan oleh Mahkamah Tinggi dan juga Mahkamah Rayuan. Isu tersebut adalah berkenaan dengan kesahan kontrak. Sebaiknya isu kesahan ini ditimbang dan diputuskan oleh Mahkamah Tinggi dan Mahkamah Rayuan ketika memutuskan sama ada kontrak tersebut tidak sah di bawah peruntukan Akta LPIPM. Di Mahkamah Tinggi isu kesahan kontrak telah ditinggalkan di peringkat penghujahan dan malah tidak pun dinyatakan di dalam memorandum rayuan perayu ke Mahkamah Rayuan. Peninggalan isu ini jelas kelihatan dalam kedua-dua penghakiman Mahkamah Tinggi dan Mahkamah Rayuan. Oleh itu, Mahkamah Persekutuan tidak boleh membuka dan mempertimbang semula isu ini.

(3) Soalan-soalan yang dikemukakan tidak dirangka dengan sewajarnya di bawah s. 96(a) AMK. Selain itu, soalan-soalan tidak berkaitan dengan perkara berkenaan yang mana satu keputusan telah dibuat oleh Mahkamah Tinggi dan Mahkamah Rayuan. Begitu juga, tiada keterangan bahawa isu kesahan kontrak pernah dibangkitkan di Mahkamah Rayuan. Adalah satu perbuatan yang membazirkan masa kehakiman, selain bukan menjadi satu pelaksanaan kuasa yang wajar, bagi Mahkamah Persekutuan untuk turun padang memutuskan soalan-soalan sebegini yang jelas tidak mempunyai kesan mengakas keputusan Mahkamah Rayuan.

Case(s) referred to:

Joceline Tan Poh Choo & Ors v. V Muthusamy [2009] 1 CLJ 650 ***(refd)***

Lim Geak Liang v. East West UMI Insurance Bhd [1997] 4 CLJ 405 FC ***(refd)***

The Minister for Human Resources v. Thong Chin Yoong & Another Appeal [2001] 3 CLJ 933 FC ***(foll)***

Letchumi & Anor v. The Asia Insurance Co Ltd [1972] 1 LNS 74 ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, s. 96(a)

Industrial Relations Act 1967, s. 20(3)

Rules of the Federal Court 1995, r. 108(1)(c)

A *For the appellant - JA Yeoh; M/s Shearn Delamore & Co*
For the respondent - Karin Lim; M/s Lim Leng Han & SF Tho

[Appeal from Court of Appeal, Civil Appeal No: P-02-669-1999]

Reported by Usha Thiagarajah

B

JUDGMENT

Nik Hashim FCJ:

C **[1]** This appeal concerns the propriety of questions of law formulated pursuant to s. 96(a) of the Courts of Judicature Act 1964 in a civil appeal to this court.

[2] On 19 March 2007, this court allowed the appellant's application for leave to appeal against the Court of Appeal's D decision of 28 March 2006 based on the following questions:

(i) Whether the building contract entered into between Dataran Rentas (the appellant) as the employer and the BMC Construction (the respondent) as the contractor in pursuance E of the letter of award dated 29 July 1997 is illegal under the provisions of the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 (LPIPM Act).

(ii) Whether the respondent is entitled to present a winding up petition on the basis of the architect certificates or enforce F payment of the architect certificates issued in respect of the building contract entered into between the appellant as the employer and the respondent as the contractor in pursuance of the letter of award dated 29 July 1997.

G **[3]** The facts of the case are that by a letter of award dated 29 July 1997 the appellant awarded a building contract to the respondent. Pursuant to the letter of award, it was agreed that the terms and conditions of contract are as per the PAM standard Form Contract 1969 Edition (without Quantities) (PAM Conditions) H wherein cl. 30(1) of the PAM Conditions read with the Appendix, the appellant was contractually obliged to pay the respondents the amount due under the Interim Certificates within thirty days. The appellant failed to pay four interim certificates (certificates No. 5 to 8) amounting to RM173,096.18 within the time stated under I cl. 30(1) of the PAM Conditions. As a result the respondents filed a winding-up petition in the High Court against the appellant. The appellant was accordingly wound up that led to the appeal to the Court of Appeal which dismissed the appeal.

[4] At the conclusion of submissions of learned counsel from both sides on 4 November 2008, we declined to answer the questions posed as they do not come within the ambit of s. 96(a) of the Courts of Judicature Act 1964 (the Act). In the result we did not consider the merits of the appeal and ordered that the appeal be dismissed with costs. The deposit be paid to the respondent towards its taxed costs.

[5] For ease of reference, it is perhaps necessary to be reminded of the requirements of s. 96(a) of the Act which states as follows:

> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
>
> (b) ...

[6] To come within the ambit of s. 96(a) of the Act, the applicant must, apart from satisfying this court that the judgment of the Court of Appeal is in respect of any civil matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage, frame the question in such a manner as to incorporate a point of law the answer to which has the effect of reversing the judgment of the Court of Appeal. In this regard Augustine Paul FCJ, in delivering the recent judgment of this court in *Joceline Tan Poh Choo & Ors v. V Muthusamy* [2009] 1 CLJ 650, said p 659:

> This would depend ... on the nature and manner in which the question for appeal is framed. It must be so couched as to incorporate a point of law which has the effect of reversing findings made against the intending appellant without any further evaluation of the evidence. This in turn means that the answer given to the question must be such that it has the effect of reversing the judgment.

[7] Besides, the questions posed must relate to a matter in respect of which a determination has been made by the High Court and the Court of Appeal. However, a new point of law can be raised if all the facts necessary to support it have been raised in the Court of Appeal (see *Joceline Tan Poh Choo, supra*; *Lim Geak Liang v. East West UMI Insurance Bhd* [1997] 4 CLJ 405 FC).

[8] In *The Minister for Human Resources v. Thong Chin Yoong & Another Appeal* [2001] 3 CLJ 933 this court (Wan Adnan Ismail CJ (Malaya), Siti Norma Yaakob FCJ, Haidar Mohd Noor FCJ) declined to answer the question framed for its determination. There the respondent was the Hotel & Resort Development Manager of Berjaya Industrial Berhad ('the company'). He was suspended from work by the company pending investigation of allegations of misconduct. The respondent being dissatisfied with the prolonged investigations considered himself constructively dismissed. The matter was eventually referred to the Minister for Human Resources ('the Minister') and the Minister, in the exercise of his discretion under s. 20(3) of the Industrial Relations Act 1967, declined to refer the case to the Industrial Court for an award. The respondent then applied to the High Court for an order of *certiorari* and *mandamus* against the Minister's decision. The respondent was successful before the High Court as well as before the Court of Appeal. In this instance, the Minister and the company, appealed before the Federal Court.

In granting leave to appeal on 28 August 2000 this court, pursuant to r. 108(1)(c) of the Rules of the Federal Court 1995, framed the following question for its determination:

> Whether the employer can suspend an employee without loss of pay, benefits and perks pending the conclusion of the investigations and inquiries into his conduct notwithstanding that this is not stated in the terms of employment.

Haidar Mohd Noor FCJ (later CJ (Malaya)), in delivering the judgment of this court, said at p. 941:

> It seems to us that the Federal Court was asked to consider an issue which was not determined by the High Court as well as the Court of Appeal. To that extent the proper order that we should make would be to regrettably decline to answer the question. It is best that the issue of suspension be considered by the Industrial Court in determining whether the claimant was dismissed without just cause or excuse or as he put it "constructively dismissed".

> In the circumstances of the case we agree with the preliminary objection of counsel for the claimant that the question framed by this Court for its determination does not come within the ambit of s. 96(a) of the Courts of Judicature Act 1964. In the result we need not consider the merits as submitted by counsel for the parties and it follows that both appeals must be dismissed with costs and we so order. In our view we can make such an order without considering the merits of the appeal (*Capital Insurance Bhd. v. Asiah bte Abdul Manap & Anor* [2000] 4 CLJ 1) ...

[9] Likewise in the present case, this court was asked to answer an issue which was not determined by the High Court as well as the Court of Appeal. The issue was on the legality of the contract. It is best that the issue of the legality be considered and decided by the High Court and the Court of Appeal in determining whether the contract is illegal under the provisions of the LPIPM Act. Be it noted that the issue of legality of contract was abandoned in the High Court at submission stage and in fact not even stated in the appellant's memorandum of appeal at the Court of Appeal. The abandonment of the issue is clearly evidenced in both the High Court and the Court of Appeal judgments. Therefore, this court cannot reopen and reconsider the issue. As Ong CJ (Malaya) observed in the Federal Court case of *Letchumi & Anor v. The Asia Insurance Co. Ltd.* [1972] 1 LNS 74:

> An omission, at the trial, by inadvertence or otherwise, to convass an arguable point is not the same thing as abandoning it altogether – which would have precluded us from re-opening and reconsidering the matter.

[10] Such being the case, we held that the questions posed were not properly framed under s. 96(a) of the Act. Further, they do not relate to a matter in respect of which a determination has been made by the High Court and the Court of Appeal. Neither is there any evidence that the issue of legality of the contract was ever raised in the Court of Appeal. So, it would be a waste of judicial time and indeed not a proper exercise of authority of this court to engage itself in deciding such questions the answer to which would not have the effect of reversing the judgment of the Court of Appeal. The court would not indulge in a fruitless exercise. Thus, this court has the power to decline to answer the questions posed despite the fact that leave to appeal had been granted. In the result, we declined to answer the questions and dismissed the appeal without considering its merits.